UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ENTERGY NUCLEAR VERMONT YANKEE, LLC and ENTERGY NUCLEAR OPERATIONS, INC. Plaintiffs, v. PETER SHUMLIN, in his official capacity as Governor of the State of Vermont; WILLIAM SORRELL, in his official capacity as Attorney General of the State of Vermont; and MARY N. PETERSON, in her official capacity as the Commissioner of the Department of Taxes of the State of Vermont, Defendants.	)	Case No. 5:12-cv-206

DEFENDANTS' MOTION TO DISMISS

Challenges to state taxes do not belong in federal court. Plaintiffs bring this action to enjoin the collection of a state tax – but the Tax Injunction Act prevents federal courts from enjoining the collection of state taxes so long as the party challenging the tax has an adequate remedy in state court. As this Court and the Second Circuit have both repeatedly recognized, Vermont's administrative and judicial processes are the appropriate forum to litigate disputes, including constitutional challenges, arising from the assessment and collection of Vermont taxes. Therefore, Defendants (collectively, the "State") move to dismiss Plaintiffs' Complaint pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. As explained in detail in the following incorporated Memorandum of Law, the Complaint should be dismissed in its entirety because Plaintiffs' claims are barred by the Tax Injunction Act and the principles of federal/state comity underlying the Tax Injunction Act.

MEMORANDUM OF LAW

Introduction

In the Complaint, Plaintiffs lodge a series of constitutional challenges to Vermont's Electrical Energy Generating Tax ("EET"), found at 32 V.S.A. § 8661, as recently amended and effective July 1, 2012. 2011 Vt. Acts & Resolves No. 143 ("Act 143") § 58. Specifically, Plaintiffs seek a declaration that the EET is preempted by federal law and otherwise unconstitutional, as well as injunctive relief prohibiting the State from imposing, assessing, and collecting the EET.

Notwithstanding their mistaken allegations to the contrary, *see* Complaint ¶ 8, Plaintiffs clearly are entitled to raise their federal challenges to the EET at the Vermont Department of Taxes and to seek review of any administrative ruling in the Vermont state courts. Indeed, as explained below, the previous owner of the nuclear power plant now owned and operated by Plaintiffs took advantage of these state procedures to challenge a previous version of the EET on federal constitutional grounds. Plaintiffs have a "plain, speedy and efficient" method of challenging the EET in a state forum. Accordingly, Plaintiffs claims are barred both by the Tax Injunction Act – which divests the federal courts of jurisdiction over federal challenges to state tax assessments – and the principles of comity underlying the Tax Injunction Act.

Background – State Procedure For Challenging The EET

The EET generally provides for assessment of a "state tax at the rate of $0.0025 per kWh of electrical energy produced" on "electrical generating plants constructed in the state subsequent to July 1, 1965, and having a name plate generating capacity of 200,000 kilowatts, or more." Act 143 § 58(a); *see also* Complaint ¶ 50. Plaintiffs acknowledge that they are subject to this assessment. Complaint ¶¶ 50-51. Procedurally, the EET provides that failure to "make returns

or pay the tax" subjects a taxpayer to whom the tax applies to "the provisions of sections 3202 and 3203 of [Title 32]." Act 143 § 58(b). Section 3202 provides for the assessment of interest and penalties on any taxpayer who fails to file a return or pay a tax liability. 32 V.S.A. § 3202. Section 3203 provides the procedure through which taxpayers are notified of either a deficiency in tax payments or a denial of a requested refund. 32 V.S.A. § 3203.

Pursuant to state law, after receiving notice of a deficiency or the denial of a refund, a taxpayer is entitled to appeal this initial decision within 60 days to the Commissioner of Taxes (the "Commissioner"). 32 V.S.A. § 5883; *see also* Vermont Dep't of Taxes Organization and Rules of Procedure (the "Procedural Rules" – attached as Exhibit A), Rule 4(a) ("A taxpayer or claimant . . . may appeal to the Commissioner any action of the Department for which appeal is provided by law including assessment, denial in part or whole of a refund claim . . . ."). After a taxpayer files such an appeal, it is entitled to an on-the-record hearing before the Commissioner (or a "designated hearing officer") at which it may introduce evidence in support of its claims and after which it may submit "proposed findings of fact and/or memoranda of law." Procedural Rules, Rules 4(c)-(g). Moreover, any hearing held by the Commissioner pursuant to 32 V.S.A. § 5883 must conform to Vermont's Administrative Procedure Act ("APA"), 3 V.S.A. §§ 801 *et seq.* *See* 32 V.S.A. § 5885(a). In the event of an adverse decision by the Commissioner, a party is entitled to appeal the decision "to the Washington [County] superior court or the superior court of the county in which the taxpayer resides or has a place of business." 32 V.S.A. § 5885(b).

Thus, under this statutory scheme, Plaintiffs have two options for challenging the EET in a state forum. They can (1) pay the tax and claim a refund based on their assertion that the tax is invalid under federal law or (2) refuse to pay the tax and appeal any notice of deficiency the

Commissioner assesses against them.[1] In either case, Plaintiffs would be entitled to a full review of their claims by the Department of Taxes in conjunction with the Vermont state courts and, if certiorari were sought and granted, the U.S. Supreme Court.

In fact, the EET has been challenged using the first of these options in the past. In *In re Vermont Yankee Nuclear Power Corp., Electrical Generating Tax*, ATC-91-103 (Sept. 12, 1997) ("VYNPC Determination" – attached as Exhibit B[2]), the Vermont Yankee Nuclear Power Corporation ("VYNPC") – the previous owner of the nuclear power plant presently owned and operated by Plaintiffs – claimed a refund of the EET on the ground that the EET in its previous form was invalid because, *inter alia*, it was preempted by federal law and because it violated the Equal Protection Clause. VYNPC Determination at 14-19. After full consideration and analysis of VYNPC's federal constitutional arguments, the Commissioner upheld the tax. *Id*. at 19. It does not appear that VYNPC took advantage of its right to appeal the Commissioner's determination to the superior court.

Legal Standard

"A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Taite v. Shinseki*, No. 5:10-cv-270, 2011 WL 2414316, at *2 (D. Vt. June 14, 2011) (Reiss, C.J.) (quoting *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000)). In deciding a motion to dismiss under Rule 12(b)(1), the court must take all facts alleged in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Saunders v. Morton*, No. 5:09-cv-125, 2011 WL 1135132, at *3 (D. Vt. Feb. 17, 2011). However, "[w]hen reviewing a complaint for subject

[1] Of course, under this second option, Plaintiffs risk imposition of interest and penalties for failure to pay the assessment in a timely manner. *See* 32 V.S.A. § 3202.

[2] Certain financial information in the VYNPC Determination has been redacted out of concern for confidentiality.

matter jurisdiction, a court is allowed to consider extrinsic evidence and is not limited to the information contained in the pleadings." *Taite*, 2011 WL 2414316, at *2 (citing *Kamen v. Am. Tel. & Tel. Co.*, 791 F.2d 1006, 1011 (2d Cir. 1986)). Ultimately, the burden is on the party invoking federal jurisdiction to prove facts to establish that jurisdiction. *Id.*

Argument

I. PLAINTIFFS' CLAIMS ARE BARRED BY THE TAX INJUNCTION ACT.

The allegations in the Complaint show that the present action is barred by the Tax Injunction Act, 28 U.S.C. § 1341, because the Vermont Department of Taxes and the Vermont state courts offer an adequate forum through which Plaintiffs may raise their challenges to the EET.

The Tax Injunction Act prohibits federal district courts from enjoining the collection of a state tax where an avenue for challenging the tax is available under state law. Specifically, the Tax Injunction Act provides that

> [t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1341. The Supreme Court has "interpreted and applied the Tax Injunction Act as a jurisdictional rule and a broad jurisdictional barrier." *Arkansas v. Farm Credit Servs. of Cent. Arkansas*, 520 U.S. 821, 826 (1997) (quotations omitted). As this Court has recognized, "[t]he principle rationale for the Tax Injunction Act was 'to limit drastically federal court jurisdiction to interfere with so important a local concern as the collection of taxes.'" *Boivin v. Town of Addison*, No. 2:08-CV-66, 2008 WL 2787345, at *3 (D. Vt. July 15, 2008) (quoting *Rosewell v. Lasalle Nat'l Bank*, 450 U.S. 503, 522 (1981)), *aff'd*, 366 Fed. Appx. 201 (2010); *see also Baechle v. Town of Mendon*, No. 1:05-CV-204, 2005 WL 3334708, at *2 (D. Vt. Dec. 8, 2005)

("It is well-settled that taxpayers ordinarily must challenge the validity of a state tax system in state court."), *vacated on other grounds sub nom., Luessenhop v. Clinton Cty., New York*, 466 F.3d 259 (2006).

Moreover, it is well established that the Tax Injunction Act bars claims for declaratory as well as injunctive relief. *See California v. Grace Brethren Church*, 457 U.S. 393, 411 (1982) ("[B]ecause Congress' intent in enacting the Tax Injunction Act was to prevent federal-court interference with the assessment and collection of state taxes, we hold that the [Tax Injunction] Act prohibits declaratory as well as injunctive relief."). Thus, Plaintiffs' claims for injunctive and declaratory relief are barred so long as the State provides a "plain, speedy and efficient" remedy.

As explained above, the State provides such a remedy. Plaintiffs are entitled to challenge the EET assessment through an appeal to Vermont's Commissioner of Taxes of either a notice of deficiency or denial of a refund. The Commissioner, in turn, is authorized to take evidence and hold a hearing on the validity of the assessment. While the Commissioner is not authorized to declare a state statute unconstitutional, *e.g., Williams v. State*, 156 Vt. 42, 53, 589 A.2d 840, 847 (1990), it is well-established that the Commissioner may take evidence on the constitutionality of a tax statute to determine whether a statute has been constitutionally applied. *See Stone v. Errecart*, 165 Vt. 1, 5, 675 A.2d 1322, 1325-26 (1996); *Williams*, 156 Vt. at 53-54, 589 A.2d at 847-47. In the event of an adverse ruling by the Commissioner, Plaintiffs may appeal the Commissioner's decision to the Vermont Superior Court, which is fully authorized to consider the constitutional claims Plaintiffs raise in the Complaint. If Plaintiffs disagree with the Superior Court's decision, Plaintiffs may then appeal that decision to the Supreme Court, which, of course, is also plainly authorized to consider federal constitutional questions. *See, e.g., Hoffer v.*

Dept. of Taxes, 2004 VT 86, 177 Vt. 537, 861 A.2d 1085 (2004) (analyzing federal due process and equal protection challenges to Vermont tax); *USGen New England v. Town of Rockingham*, 2003 VT 102, 176 Vt. 104, 838 A.2d 927 (2003) (entertaining federal and state constitutional challenges to statute temporarily freezing tax valuation of power plant). Indeed, as previously noted, this procedure has been used to challenge a previous version of the EET, resulting in a comprehensive constitutional analysis of the statute. *See generally* VYNPC Decision.

Moreover, the Second Circuit and this Court have repeatedly held that Vermont's tax assessment review processes satisfy the Tax Injunction Act's "plain, speedy and efficient remedy" requirement. *See Murray v. McDonald*, 157 F.3d 147, 148 (2d Cir. 1998) (concluding that Vermont law provides a "plain, speedy and efficient remedy" because the "courts of Vermont are empowered to decide constitutional questions"); *Boivin*, 366 Fed. Appx. at 202 ("[The plaintiff] has admitted on appeal that Vermont courts are empowered to consider constitutional claims; this is all that is necessary for the state court's remedies to be adequate under the Tax Injunction Act."); *Hoffer v. Ancel*, No. 1:01-CV-93, slip op. at 4 (D. Vt. June 27, 2001) (copy attached as Exhibit C) ("[T]he State of Vermont provides a plain, speedy and efficient method for determining the plaintiff's claims.").[3]

Therefore, it is beyond serious dispute that Plaintiffs have the opportunity to pursue a "plain, speedy and efficient remedy" for their challenges to the EET in a State forum. Accordingly, the claims in the Complaint should be dismissed because Plaintiffs' action is barred by the Tax Injunction Act.

[3] *See also Evangelical Catholic Communion, Inc. v. Thomas*, 373 F. Supp. 1342, 1343 (D. Vt. 1973) ("The rule allowing civil rights actions to be maintained under 42 U.S.C. § 1983 without the prior exhaustion of state judicial remedies does not constitute an exception to the exhaustion requirement of the Tax Injunction Act. . . . A 'plain, speedy and efficient remedy' is available to the plaintiffs in the Vermont courts.").

II. PRINCIPLES OF COMITY MANDATE DISMISSAL OF PLAINTIFFS' CLAIMS.

Even if the Tax Injunction Act did not bar Plaintiffs' claims, principles of federal/state comity still would mandate dismissal of the Complaint. As the Supreme Court has explained, even in situations where the Tax Injunction Act does not explicitly "bar federal court interference in state tax administration, principles of federal equity may nevertheless counsel the withholding of relief." *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 525 n.33 (1981). This is because

> [i]t is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public.

Dows v. Chicago, 11 Wall. 108, 110, 20 L. Ed. 65 (1871) (quoted in *Levin v. Commerce Energy, Inc.*, 130 S. Ct. 2323, 2330 (2010)). Importantly, "[c]omity's constraint has particular force when lower courts are asked to pass on the constitutionality of state taxation of commercial activity," *Levin*, 130 S. Ct. at 2330, and in such cases, the federal courts are cautioned to "refrain from taking up cases [alleging uneven tax burdens], so long as state courts are equipped fairly to adjudicate them." *Id*. at 2334.

Again, Plaintiffs' Complaint generally asserts that the State has levied an unfair assessment on an indisputably commercial activity. Moreover, as explained in detail above, the State has provided an adequate state law procedure through which Plaintiffs may assert their challenges to the assessment. Therefore, even if Plaintiffs could somehow show that their claims were not barred by the Tax Injunction Act, the principles of comity underlying that statute still would preclude federal district court adjudication of their claims. *See National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 590 (1995) ("Given the strong

background presumption against interference with state taxation, the Tax Injunction Act may be best understood as but a partial codification of the federal reluctance to interfere with state taxation."). Accordingly, the Complaint should be dismissed in its entirety.

CONCLUSION

There can be no question that state law provides Plaintiffs an adequate procedure through which they may raise the challenges in the Complaint. Therefore, the State's Motion to Dismiss should be granted and Plaintiffs' Complaint dismissed in its entirety in accordance with the Tax Injunction Act and the principles of comity underlying that statute.

DATED at Montpelier, Vermont this 24th day of September 2012.

STATE OF VERMONT

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of September, 2012, I electronically filed Defendants' Motion to Dismiss with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to: Matthew B. Byrne, Robert B. Hemley, and Robert A. Salerno; and that on this same date I sent via U.S. mail, first class, a copy of such filing to the following unregistered participants:

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